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硕 士 学 位 论 文

论表面证据在医疗损害案件中的适用

A Research on the Application of Prima Facie

Evidence Rule in Medical Damage Cases

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摘要

近年来，在深受德日证明责任理论影响的我国诉讼法学界，不少学者纷纷将视线从抽象的证明责任转移到具体的证明责任，从客观证明责任的分配到实践中证明行为理论的研究。与此同时，也有学者开始介绍英美国家的重在发现事实的证据法规则，希望能为我国证据法提供不同的思路和启发。本文基于证明责任理论从客观证明理论向诉讼程序中具体证明行为和证明评价的转向，希望通过介绍表面证据规则在医疗损害案件中的适用，探讨在诉讼中不断转移提供证据责任的可能性。

表面证据(*prima facie evidence*)，又称初步证据，布莱克法律大辞典将其解释为“除非相反的证据被提出，否则据此证据已能确立某项事实或支撑某项判决。^①其能导致一项证据推定或者并不排除其他证据，但除非对方提出相反证据，表面证据被视为充足。表面证据在两层意义上被使用：第一层意义上是使得案件成立的表面证据。如果不具备此表面证据，法官可不经陪审团直接宣告案件不成立。第二层意义上的表面证据是如果对方不提出其他证据，案件的事实裁判者依据表面证据做出对提出表面证据一方有利的判决。表面证据规则与大陆法系的表见证明可能会有所混淆。但是，基于法系和诉讼程序的不同，作为证据规则的表面证据和作为制度的表见证明还是有所区别的。即在具体诉讼中，实体法或法官自由裁量认为某证据是一种表面证据，而表见证明制度更侧重于证明评价。当然，在最终效力上，两者都接近于可推翻的推定。

表面证据规则从诉讼的角度分析证明责任，将案件中的证明责任分配为各个阶段，不断在当事人之间进行举证责任的转移，有利于发现真实。适用表面证据规则的前提在于考察其源流，界定其概念，发现其运行机理，明确其适用范围。

本文除引言和结语外，共分为四章。

第一章 表面证据规则。表面证据语义为“第一眼的证据”。表面证据有两层含义。第一层意义上是使得案件成立的表面证据。如果不具备此表

^①GARNER, A. BRYAN, *Black's Law Dictionary*[Z], A Thomson Reuters Business, 2009, 638-639.

面证据，法官可不经陪审团直接宣告案件不成立。第二层意义上的表面证据是如果对方当事人不提出其他证据，案件的事实裁判者将做出对提出表面证据一方有利的判决。

第二章 我国医疗损害纠纷的证明责任分配。我国医疗损害纠纷的证明责任分配有其历史沿革，分为三个阶段。第一个阶段为“谁主张，谁举证”的阶段，该阶段将医疗纠纷纳入法治进程；第二个阶段为“举证责任倒置”阶段。迫于医疗纠纷中患方举证能力薄弱的现实考虑，将证明责任加诸医院一方，医院方不堪重负；第三个阶段为《中华人民共和国侵权责任法》（以下简称《侵权责任法》。）实施后，分类型区分医疗损害举证责任。《侵权责任法》颁布后，我国一些省市高院也制定了医疗损害案件的审判指导意见。其中多有关涉表面证据的内容。

第三章 美国医疗侵权理论及案例解读。美国医疗侵权理论发展于 19 世纪中期，至今形成了完备的侵权法体系。在医疗损害案件中，原告应当承担建立表面上成立的案件的责任。且该案件是有其要件的。首先，医生应当存在一定的义务；其次，医生未达成该义务；再次，因果关系要件。最后，损害的存在。该四点均由原告承担一定的证明责任。如果原告未能建立表面上成立的案件，医疗机构方可以申请法官不经陪审团直接裁判。

第四章 我国医疗损害案件适用表面证据规则的可能性之探讨。出于发现真实，实现个案正义的考虑，应尽可能在诉讼的具体进程中通过技术性规则裁判案件而减少适用客观证明责任分配的场景。表面证据规则是本文所选取的技术规则，希望通过探讨其适用的可能以促进我国证明责任学说的发展。在我国司法实践中，法院一方面制定审判意见以成文法形式规定表面证据，另一方面在个案中适用表面证据规则进行裁判。可见表面证据规则有其实践的需求。适用表面证据规则的路径可以考虑细化表面证据规则与赋予法官自由裁量权并行。在细化表面证据规则方面，在医疗损害案件中明确规定何为过失的表面证据、何为因果关系的表面证据。与此同时，司法实践总会有新问题，因此，赋予法官在真伪不明时适用表面证据规则的空间尤为必要。

关键词：表面证据；医疗侵权；阶段举证

ABSTRACT

In recent years, influenced deeply by Germany and Japan, many procedure law scholars in our country recently turn their attention from the abstract burden of proof to the specific burden of proof and from the distribution of objective burden of proof to the behavioral proof theory in practice. Meanwhile, some other scholars are seeking for alternative approaches by introducing British and American evidence law which focus on the discovery of truth. This thesis is based on the turning of objective burden of proof to specific behavioral proof theory, and intent to explore the possibilities of the proof burden moving in the process of the proceedings of medical tort cases by introducing the prima facie evidence rule.

Prima facie evidence is evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced. The legislative branch may create an evidential presumption, or a rule of prima facie evidence, that is to say a rule which does not shut out evidence, but merely declares that certain conduct shall suffice as evidence until the opponent produces contrary evidence. A prima facie evidence is used in two occasions. In the first side a prima facie evidence is to build a case that the procedure would continue. The second side is to say that if the opposite side would not provide evidence, the prima facie evidence provider would receive a good judgment. The prima facie evidence is sometimes confused with prima facie beweis. However, course of the differences in law systems and others; they are different in many occasions. Prima facie evidence is also different from res ipsa loquitur. Prima facie is often confused with the term res ipsa loquitur. Res ipsa loquitur is a legal doctrine that means the facts making it self-evident that something did or did not occur. Res ipsa loquitur literally means "the thing speaks for itself." In other words, the key under the res ipsa loquitur doctrine is that the proponent (i.e. moving

party) does not have to prove any additional facts to show that something did or did not occur because any reasonable person would immediately find the facts as shown. While under the prima facie doctrine, some minimum amount of evidence must be shown before there is enough evidence for a trial. However, both doctrines of *res ipsa loquitur* and prima facie can be rebutted. In medical damage cases, American judges use prima facie evidence to judge cases too.

In China, some cases are judged in prima facie rule. Prima facie evidence has a unique value. Prima facie evidence rule from the perspective of the proceedings the burden of proof, the proof of the case in the allocation of responsibilities into various stages, continuously be transferred between the parties, found in favor of the real. Prima facie evidence of its origins both legal context, but also has the actual needs of judicial practice in China. The application of the rules of evidence should examine its origins, define its concepts, find its operation mechanism, and clarify its scope of application.

This thesis is divided into four chapters.

Chapter I

It is an introduction of the prima facie evidence of etymology, concepts, operation mechanism, functions, and common law rules of evidence and the lower surface of the prima facie evidence of the relevant legislation.

Chapter II

The burden of the proof in medical damage disputes has its history that is divided into three stages. This article will present guidance on where the trial judiciary made a text interpretation.

Chapter III

American tort theory and cases.

American tort theory has developed from the middle of the 19th century. Nowadays there is a comprehensive system in tort theories. In medical damage cases, the plaintiff should build a prima facie case. There should be a standard. And the standard shouldn't be realized. Course of the broken of the standard the plaintiff has damage.

Chapter IV

There is a possibility for the application of prima facie evidence rule in Chinese medical damage cases.

In China some cases are judged by prima facie evidence rule. To use this rule we can refine the rule of prima facie evidence and give the judges discretionary power. To refine the rule, we can stipulate what is the prima facie evidence in negligence and what is the prima facie evidence in causality. At the same time, in new cases there always are new problems. So we should endue the judges' discretionary power.

Keywords: Prima Facie Evidence; Medical Damage Cases; Stages of Proof

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